United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1587

To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1587

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHESTER KASIANCZUK,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Statement of the Case

On April 15, 1976, a Federal Grand Jury sitting in Hartford, Connecticut returned a one-count indictment charging the defendant with possession of an unregistered sawed-off shotgun in violation of Title 26, United States Code, Sections 5861(d) and 5871.

On August 26, 1976 the defendant was arrested by Special Agents of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department. A plea of not guilty to the indictment was entered on September 1, 1976. Trial by jury before the Honorable T. Emmet Clarie, Chief Judge, United States District Court, commenced on November 10, 1976. The jury returned a verdict of guilty on November 11, 1976. On December 13, 1976 Chief Judge Clarie sentenced the defendant to imprisonment for a term of sixteen (16) months. The defendant is presently incarcerated.

Statutes Involved

Title 26, United States Code, Section 5861(d):

26 U.S.C. § 5861(d)

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

Title 26, United States Code, Section 5871:

26 U.S.C. § 5871

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Questions Presented

1. Was Officer Murphy's response to the government's inquiry concerning the defendant's post-arrest statement an improper comment upon his exercise of the Fifth Amendment?

2. Did the Court err in refusing to instruct the jury on the defendant's theory of the case in the manner requested by the defendant?

3. Did the Court properly instruct the jury concerning actual and constructive possession?

Statement of the Facts

At approximately 1:08 a.m. on March 26, 1976 Hartford, Connecticut, Police Officers Bruce Boland and Thomas Murphy, then on duty in separate police cruisers, were instructed by the Hartford Police Department radio dispatcher to investigate a complaint involving a white male with a sawed-off shotgun in a blue car parked outside the Royal Cafe, 4 New Park Avenue, Hartford, Connecticut (Tr. at 13-14, 32).* Both Officers were parked next to each other within 150 feet of the Royal Cafe and arrived at the Cafe within 20 seconds of receiving the radio dispatch (Tr. at 15, 32-33). Upon arriving at the Royal Cafe Officer Murphy was met by Salvatore Mancini, the owner of the cafe and the individual who called the police, who pointed out the blue car to Officer Murphy. The officers ordered Mary Beth Metz, Peggy Prentice and Chester Kasianczuk, the defendant, out of the car at gun point. The officers then ordered Metz, Prentice, Kasianczuk and Richard Shepard, who had been standing next to the driver's window of the vehicle, to place their hands against the car. Officer Boland approached the open passenger door and looked inside to determine if anyone was lying down in the car at which time he observed a loaded sawed-off shotgun on the front passenger-side floor (Tr. at 20, Exhibit 2). Officer Murphy conducted a protective search of the defendant, who had been seated in the vehicle in the front passenger seat, and discovered five shotgun shells (Tr. at 37, 39). In addition, Officer Murphy recovered two shotgun shells from the ground after he observed Kasianczuk throw something under the car (Tr. at 40). After placing Kasianczuk under arrest for possession of a dangerous weapon and advising him of his constitutional

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* References marked Tr. refer to trial transcript.

rights Officer Murphy asked him about the gun. Kasianczuk responded "I don't know what you are talking about." (Tr. at 47).

The government also introduced at trial oral statements made by Kasianczuk to Special Agents of the Bureau of Alcohol, Tobacco and Firearms Division of the Treasury Department in which he admitted sawing off the barrel of the shotgun (Tr. at 140). In addition, Richard Shepard testified that just before the arrival of the police officers he approached the car at which time Kasianczuk pointed the shotgun at him (Tr. at 115-119).

The defendant testified that he found the sawed-off shotgun a few seconds before the police arrived and knew nothing of its existence prior to that time. He added that it was his intention to throw the gun into the river (Tr. at 213). While the defendant admitted telling Agent Clifford that he had sawed off the barrel of the shotgun he testified he was only "joking around" when he made that statement (Tr. at 220).

Mary Beth Metz, who was subpoenaed to testify by the government and the defendant, took the Fifth Amendment when questioned about the sawed-off shotgun. However, about a week prior to the trial, Miss Metz discussed her involvement with the sawed-off shotgun with counsel for the defendant and Mario Conte, a law student intern for the public defender's office. Through Mr. Conte and Rule 804 of the Federal Rules of Evidence the jury heard Miss Metz. Mr. Conte testified that Miss Metz told him that she had obtained the sawed-off shotgun from James Deleria (a dead man) and had hid it under the seat of the car, unknown to the defendant, for the

purpose of killing Rita Gaginer, the defendant's girlfriend.[1]

I.

Officer Murphy's response to the government's inquiry concerning the defendant's post-arrest statement was not an improper comment upon his exercise of the Fifth Amendment.

Immediately following his arrest Kasianczuk was advised of his constitutional rights by Officer Murphy. In response to two questions asked by the Officer, Kasianczuk replied, "I don't know what you are talking about." The defendant asserts that the introduction of these statements at trial impermissibly prejudiced his defense and infringed upon his right to remain silent.

While defendant has correctly stated the law as set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and extended by *United States* v. *Hale*, 422 U.S. 171 (1975) and *Doyle* v. *Ohio*, 426 U.S. 610 (1976), he has ignored the distinction between an exercise of the Fifth Amendment and a false exculpatory statement. Furthermore, he has distorted the significance of a response mistakenly given by Officer Murphy during the government's case-in-chief.

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[1] Miss Metz was then pregnant by the defendant. At trial she testified that she did not see the defendant point the gun at Richard Shepard (Tr. at 64). However, she testified before a Federal Grand Jury in Hartford on April 14, 1976 at which time she denied having a gun and admitted seeing the defendant point the shotgun at Richard Shepard on March 26, 1976. Her explanation for this inconsistency was that she was under "emotional stress" during her Grand Jury appearance (Tr. at 64, 170-173).

There is a fundamental difference between the exercise of one's right to remain silent and a voluntary statement which acts as a waiver of that right. The government does not contest defendant's reading of the *Hale* and *Doyle* cases. Only in isolated situations may a defendant's post-arrest silence be commented upon by the prosecution. It is also undisputed that a response to police questioning such as "no comment," indicates a desire to exercise one's right to remain silent.

At the same time, however, to claim constitutional protection under the Fifth Amendment for voluntary statements or remarks equivalent to denying a relationship with an accused companion, *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975); of having been in a certain city at a certain time, *United States* v. *McConney*, 329 F.2d 467 (2d Cir. 1964); of having done business at a certain address, *United States* v. *Smolin*, 182 F.2d 782 (2d Cir. 1950); or, as was the case here, of denying possession of or knowledge about an illegal firearm, is to extend the shield provided by *Miranda* to unintended extremes. *Miranda* not only entitles an individual to stand mute in the face of accusation, but also provides that if an accused chooses to say anything, the statement can be used against him. Highlighting this distinction, the court in *United States* v. *Bennet*, 542 F.2d 63, 64 (10th Cir. 1976), citing *Klepper* v. *United States*, 331 F.2d 694 (9th Cir. 1964), stated:

> [W]e consider it of significance here that appellant spoke a little, but not much. Appellant could have remained entirely silent, in which case comment on that fact by the prosecutor would not have been proper. He chose to express himself, however, and testimony as to what he did say was in evidence.

In the instant case, defendant Kašianczuk did not remain silent but chose to make a statement. Responding to Officer Murphy's inquiry into whether he knew anything about the illegal weapon, the defendant answered: "I don't know what you are talking about." (Tr. 47).[2] Such an answer was clearly intended to exculpate the defedant. By denying that he had known of or seen the gun, the defendant sought to remove himself from suspicion. When subsequent events showed the defendant's exculpatory statements to be false,[3] Officer Murphy's testimony as to what the defendant had said was properly admitted into evidence.

It has long been held that false exculpatory statements made to law enforcement officials constitute independent circumstantial evidence of guilty consciousness. *Wilson* v. *United States*, 162 U.S. 613 (1896); *United States* v. *Johnson*, 513 F.2d 819, 824 (2d Cir. 1975); *United States*

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[2] Contrary to defendant's assertion that both he and defendant in the *Doyle* case responded to the police questioning by saying, "I don't know what you are talking about," the transcript of the *Doyle* trial reflects that defendant Doyle actually said "What's this all about?" That this question is distinctly different from an exculpatory statement which positively denies knowledge of the illegal activity is further clarified by Doyle's ensuing testimony. *Doyle* v. *Ohio*, *supra*, 426 U.S. at 623, n.4.

[3] There is little dispute that the defendant's exculpatory statement was untrue. The very fact that Kasianczuk sought to base his case upon a fleeting possession theory negates any potential credibility which the alibi otherwise might have had. In addition, the record is replete with evidence indicating that Kasianczuk's statement, that he had not known about the gun, was false. *See* for example, testimony regarding defendant's possession of the shotgun shells (Tr. 22-23, 39-40, 97); witness' testimony that the defendant had pointed the gun at Richard Shepard (Tr. 117, 119, 172); and Agent Clifford's testimony that defendant voluntarily admitted that he had sawed the barrel off the shotgun (Tr. 140).

v. *Lacey*, 459 F.2d 86, 89 (2d Cir. 1972); 2 Wigmore on Evidence, § 278, 3d Ed. In *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), this Circuit commented:

> It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have *independent probative force.* (Emphasis added.)

In *United States* v. *Pitts*, 508 F.2d 1237 (8th Cir. 1974) the defendant was convicted of possession of counterfeit bills. The factual make-up of the *Pitts* case is analogous to the instant situation. When the police arrived to investigate they found counterfeit bills lying crumpled on the floor directly in front of the theater seat where the defendant had been sitting. When confronted with the counterfeit money, the defendant denied having any knowledge of the bills. This denial was later discredited, however, when the defendant's fingerprint was found on one of the bills. In allowing the prosecution to introduce the defendant's disclaimer into evidence, the *Pitts* court stated:

> [A]ppellant's false exculpatory statement, in which he denied any knowledge whatsoever concerning the bills prior to the discovery of his fingerprint on one of them, could have been seen by the jury as a guilty man's desperate attempt to avoid arrest. In *United States* v. *Merrill*, 484 F.2d 168, 170 (8th Cir.), *cert. denied*, 414 U.S. 1077, 94 S.Ct. 594, 38 (L.Ed.2d 484 (1973), we noted that "[a] long line of cases holds that false exculpatory statements are properly admissible as substantive evidence as tending to show guilt." Once admitted here, the jury could have reasonably decided to accept the inferences of guilty knowledge and intent to defraud that arose from Pitts's false statement. *Id.* at 1240.

The means by which defendant seeks to construct the argument that he remained silent during his post-arrest period are deceptive at best. Seizing upon Officer Murphy's initial response to the question "Did he (the defendant) make any statement to you with regard to this gun?" (Tr. 44), the defendant attempts to distort what was actually said to the arresting officer. Given the somewhat ambiguous nature of the question and the events which subsequently transpired during the bench conference (Tr. 44-46), it is apparent that Officer Murphy's response of "No, he didn't." (Tr. 44) resulted from a misunderstanding of the question put to him. A "reasonableness" standard should be applied to the degree of understanding which a witness may be expected to possess when asked a question. Officer Murphy gave what he believed was an honest and correct answer to the prosecution's question. He denied that the defendant had confessed to any wrongdoing, for in fact, the defendant had done just the opposite, he had sought to exculpate himself.

That Officer Murphy's initial response resulted from a misunderstanding of the question is plainly evidenced by the colloquy between Judge Clarie and the government which took place after the defendant objected to the officer's answer. During this conversation, the prosecution represented to the court that it believed Officer Murphy's answer was unintended; that Officer Murphy had been interviewed prior to trial, and that it was anticipated that Officer Murphy would testify that defendant had in fact made a statement in which he claimed to have no knowledge of the gun (Tr. 44-45). Relying upon the government's representation that it knew its witness and what he was going to say, the court allowed the questioning to proceed. As was stated in *United States* v. *Impson*, 531 F.2d 274, 278 (5th Cir. 1976):

> It is fair to assume that the Assistant United States Attorney interviewed his witnesses in advance of trial and expected the answer given when he inquired as to any statement from Impson [the defendant] at his arrest.

Judge Clarie's reliance was subsequently justified when Officer Murphy again was asked whether defendant had said anything about the gun (Tr. 47). This time Officer Murphy correctly understood the question and repeated the exculpatory statement given to him by the defendant at the time of the latter's arrest (Tr. 47).

Even assuming that Officer Murphy's first response, while unintended, was prejudicial to the defendant, the degree of prejudice was *de minimis* and clearly constituted harmless error within the dictates of *Chapman* v. *California*, 386 U.S. 19, 22 (1966):

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

In the cases cited by defendant, the prosecution made repeated and pointed references to the defendant's post-arrest silence. In *Doyle* v. *Ohio*, *supra*, the prosecution not only cross-examined the defendant extensively about his post-arrest silence, but it also argued the defendant's silence to the jury. In *United States* v. *Impson*, *supra*, 531 F.2d at 278, the Court concluded that the Assistant United States Attorney's "only purpose in putting the question was to bring before the jury the fact of defendant's silence." Absent such aggravated circumstances, the courts have not been reluctant to declare minor and

non-prejudicial references to defendant's silence as being harmless error. *See, e.g., Rothschild* v. *New York*, 525 F.2d 686 (2d Cir. 1975); *Booton* v. *Hanauer*, 541 F.2d 296 (1st Cir. 1976); *United States* v. *Griffin*, 530 F.2d 101 (5th Cir. 1976); *United States* v. *Earl*, 529 F.2d 1145 (6th Cir. 1976); *Meeks* v. *Harener*, 545 F.2d 9 (6th Cir. 1976). In the present case there was no repeated and prolonged interrogation as was deplored in *Chapman* v. *California*, *supra*, 386 U.S. at 26. Nor was any further comment made on the subject during the government's summation to the jury. In addition, the court immediately issued a detailed cautionary instruction (Tr. 46). In light of these factors, and the strength of the government's case, the error, if any, was harmless beyond a reasonable doubt.

II.

The Court properly refused to instruct the jury on the defendant's theory of the case in the manner requested by the defendant.

The defendant claims it was reversible erorr for the Court to refuse to instruct the jury on his theory of the case. As a general rule it is error for the Court to refuse to instruct on a defendant's theory of the case where (1) there is a foundation in the evidence to support the request and (2) the defendant has submitted an instruction that is appropriate in form and substance. *United States* v. *Alfonzo-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976); *United States* v. *Leach*, 427 F.2d 1107, 1112-13 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970). Where the defendant has failed to submit a full and fair request to charge the Court is under no duty to give the instruction unless "a particularly sensitive defense is involved" or "the facts adduced at trial are so complex and confusing that an understanding of the issues would be beyond the

grasp of the jury." *United States* v. *Leach*, *supra*, 427 F.2d at 1112-13. *See, e.g., United States* v. *Platt*, 435 F.2d 789, 792 (2d Cir. 1970); *United States* v. *O'Connor*, 237 F.2d 466, 474 (2d Cir. 1956).

The defendant's "theory of the case" instruction combined a "fleeting possession" instruction with a request that the Court advise the jury that it was the defendant's "position that the government witnesses must have falsely testified against him for reasons of their own, such as to obtain their own freedom from imprisonment by providing a target for prosecution other than themselves." (Proposed Instruction No. IX, Appendix for Appellant at 5a). This proposed instruction tracks the language of an instruction submitted by the defendant in *United States* v. *Alfonzo-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976). In *Alfonzo-Perez*, the defendant attacked the credibility of four government witnesses on the basis of their "unsavory past" and "motivation to cooperate with the government." The "credibility of (these four) co-conspirator witnesses was thus the main issue at trial, and was squarely posed for the jury." *Id.* at 1363-64. In the case at bar the heart of the government's case was presented through the testimony of Hartford Police Officers Boland and Murphy, Bureau of Alcohol, Tobacco and Firearms Agent Clifford, Richard Shepard and Salvatore Mancini. There is absolutely no foundation in the evidence (no matter how weak, incredible or speculative) that these witnesses testified falsely to obtain their own freedom from imprisonment. Just what crime they committed or were concerned about escapes the imagination of the government. For example, Agent Clifford testified that Kasianczuk told him he had sawed off the barrel of the shotgun (Tr. at 140, 143). Kasianczuk himself corroborated Agent Clifford's testimony. Kasianczuk then explained that he was only "joking" with the agent when he made the statement (Tr. at 220). The main issue at

trial was not the veracity of the government witnesses but the credibility of the defendant himself who took the stand and attempted to explain, not contest, the facts presented against him during the government's case-in-chief. There is not a scintilla of evidence to justify the instruction requested by the defendant pertaining to the false testimony of government witnesses. By combining a "fleeting possession" request with a "false testimony" request the defendant submitted a misleading and confusing instruction rather than the full and fair request required. The Court "is under no compulsion to accept faulty instructions." *United States* v. *Leach*, *supra*, 427 F.2d at 1113.

Assuming, *arguendo*, that the defendant was entitled to have his theory of fleeting possession presented to the jury through the Court, despite the misleading request he submitted, there is an independent basis which compels the rejection of his argument. The instruction sought by the defendant was given by the Court in a supplemental jury instruction, a fact the defendant inadvertently, or perhaps conveniently, neglects to discuss in his brief.

The jury began its deliberations at 1:48 p.m. on November 11, 1976. Twelve minutes later, at 2:00 p.m., the jury requested clarification concerning the Court's charge "relative to the purpose and/or intent of the possession" (Tr. at 338). In response to this request Judge Clarie instructed the jury as follows:

> The question relates to the fourth element of the alleged crime. The Court's charge stated: As to the fourth element, for purposes of this section of the National Firearms Act, knowingly simply means the defendant was conscious of his possession of the weapon. Willfully means that possession was voluntary and intentional.

> An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident, or other innocent reason.
>
> The purpose of adding the word "knowingly" was to insure that no one would be convicted of an act done because of mistake or accident or other innocent reason.
>
> An act is done willfully if done voluntarily and intentionally, with specific intent to do something which the law forbids; that is, with bad purpose, and to disregard the law.
>
> I think to be more specific one might add, as an example, if the evidence disclosed that one were to find a sawed-off shotgun along the highway, and bring it home and turn it over to the police, such evidence standing alone would not be an unlawful possession, because it would be possession because of innocent reason.
>
> *Should you find from the testimony here that the defendant simply had fleeting possession of the gun in the car, having just discovered it moments before the police arrived, and was about to dispose of it in the river, as he described, that alone, standing alone, would not be willful possession.*
>
> I think that answers the question. The jury may now retire. (Tr. at 338-39) (Emphasis added).

In view of the confusing and less than fair instruction submitted by the defendant, the fact that defense counsel argued his theory in summation, the simplicity of the case and the defendant's theory, and the supplemental instruction to the jury, it is clear that there was no error in the Court's instructions.

III.

The Court properly instructed the jury concerning actual and constructive possession.

There is no question that an individual cannot be convicted of a violation of Title 26, United States Code, Section 5861 simply because he was seated in an automobile containing a sawed-off shotgun. *United States* v. *Davis*, 346 F. Supp. 405 (W.D. Pa. 1972). Similarly, proof of association with another who possessed a sawed-off shotgun would be insufficient to support a conviction. Both of these situations lack the "knowing possession" required in a prosecution under this section. *United States* v. *Freed*, 401 U.S. 601, 612 (1971) (Brennan, *J.*, concurring). However, "knowing possession" may be either actual, where the individual has direct physical control over the weapon, or constructive, where the individual, although not in actual possession, has the power and intention to control the weapon.

In *United States* v. *Shephard*, 439 F.2d 1392 (1st Cir. 1971) a sawed-off shotgun was found under the drivers seat of the defendant's automobile. The Court held that the discovery of two shotgun shells in the glove compartment warranted a finding of possession within the meaning of Title 26, United States Code, Section 5861 notwithstanding the defendant's claim that other people used the car. Ammunition found on the person of passengers supports a finding of possession. *United States* v. *Stevens*, 509 F.2d 683, 686 (8th Cir.), *cert. denied*, 421 U.S. 989 (1975); *United States* v. *Richardson*, 504 F.2d 357, 360 (5th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975); *United States* v. *Matthews*, 480 F.2d 1191, 1193 (D.C. Cir. 1973). *See also United States* v. *Birmley*, 529 F.2d 103, 107 (6th Cir. 1976)) (trunk key found in watch pocket); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971).

In the case at bar Kasianczuk had actual possession of the sawed-off shotgun when he knowingly picked up the gun and pointed it at Richard Shepard and when he cut off the barrel. He had constructive possession of the weapon while it was under the seat. Chief Judge Clarie's possession instruction merely pointed out that while the gun was under the seat, the defendant could have constructively possessed it provided he "knowingly has both the power and intention at a given time to exercise dominion or control . . . ." (Tr. at 320). *See, e.g., United States* v. *Palmer*, 467 F.2d 371, 374 (D.C. Cir. 1972).

When viewing the evidence in the light most favorable to the government it is clear that Kasianczuk was much more than a "mere passenger." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). Even without considering the testimony of Richard Shepard who testified that Kasianczuk had the gun in his hands and pointed it at him the evidence remains substantial. When the police arrived Kasianczuk was sitting on the seat beneath which the gun was found. He had five shotgun shells in his pockets (Tr. at 37, 39). He was observed throwing two shotgun shells under the car. While Kasianczuk was not the registered owner of the vehicle he had possessed it for at least a week prior to his arrest (Tr. at 56). He told Richard Sykes, the car's registered owner, not to worry about the gun being found in his car because he knew Sykes wasn't involved (Tr. at 58). He told Agent Clifford that he was the one who cut the barrel off the shotgun.

In view of the circumstances described above and the fact that the sawed-off shotgun was found in the vehicle rather than on Kasianczuk's person a constructive possession instruction was appropriate. In *United States* v. *Cecil*, 457 F.2d 1178, 1181 (8th Cir. 1972) the Court

affirmed the conviction of a defendant arrested by officers who observed a sawed-off shotgun in his left hand. The trial court gave the jury a possession instruction virtually identical to the instruction in the case at bar.

In *Sanders* v. *United States*, 441 F.2d 412 (10th Cir. 1971) the defendant was observed entering a vehicle carrying a black attache case. A sawed-off shotgun was discovered in the case after the car was stopped for a traffic violation. Sanders, like Kasianczuk, claimed the gun belonged to another passenger in the car. And Sanders, like Kasianczuk, claimed the trial court erred in giving the standard possession instruction. A panel from the tenth circuit disposed of Sanders argument:

> Sanders next argues that the trial court erred in its instructions to the jury defining "actual" as contrasted to "constructive" possession, and "sole" as opposed to "joint" possession. We note there was no objection by counsel to these several instructions and certainly this is not such plain error as would warrant our consideration of the matter. *In fact, under the circumstances, we do not regard the giving of these instructions as being error. Id.* at 415 (Emphasis added).

The appellant's claim that the Court erred in giving the jury a constructive possession instruction is without merit.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1587

UNITED STATES OF AMERICA

Appellee

v.

CHESTER KASIANCZUK

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 18th day of March, 1977, deponent served the within Brief for the Appellee upon Richard S. Cramer, Esq. Federal Public Defender 450 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me,

This 18th day of March 197 7

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977